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SUBJECT: BRAZIL: SUPREME COURT UPHOLDS BROAD INDIAN LAND RIGHTS

¶1. (U) Summary. The Federal Supreme Court (STF), in a partial vote cast by eight of the 11 judges, ruled on December 10 that the Raposa Serra do Sol (RSS) Indian reservation in Roraima state should exist with a single continuous border. The decision will put an end to non-indigenous farming in the RSS and could result in the expulsion of a small number of non-indigenous persons from the RSS. Attorneys and activists in favor of continuous demarcation cited the Brazilian Constitution's guarantees of indigenous rights, the UN Declaration on the Rights of Indigenous Peoples, and the International Labor Organization Indigenous and Tribal Peoples Convention. This case was a landmark test of indigenous land rights set out in the 1988 Constitution and is expected to serve as precedent for other disputes involving Indian lands in Brazil. The ruling is a victory not only for those in favor of strong protections for indigenous land rights, but also for federal power over local Roraima interests. End summary.

¶2. (U) The Federal Supreme Court, in a partial vote cast by eight of the 11 ministers (judges), ruled on December 10 that the RSS Indian reservation in Roraima should exist with a single continuous border. This is a defeat for seven non-indigenous rice growers and their followers, who argued that they have valid title to their lands inside the reservation, that the Court should allow enclaves for rice growing and allow non-indigenous residents to remain. Minister Marco Aurelio Mello asked for more time to examine the case and reach a finding, and under Court rules, voting was then suspended, but with eight judges already voting in favor of continuous demarcation, as it is called, the case is considered decided. Judges who have voted may change their votes, but this is unlikely.

¶3. (U) The ruling is a victory for the Indigenous Council of Roraima (CIR), which has ties to the Catholic Church, and is accused by its enemies of being an instrument of foreign NGOs. It is a loss for seven non-indigenous rice growers, and Indians allied with the Society of Indians in Defense of Roraima (SODIUR), which has ties to evangelical Christian groups. Proponents of demarcation with enclaves have argued that anything less than enclaves would have endangered Brazilian sovereignty by keeping military and police out of federal lands along the strategically important border with Venezuela and Guyana, and that foreign NGOs working through

CIR and other indigenous groups posed a risk to the entire Amazon region and threatened Brazilian sovereignty. (Note: the Defense Strategy signed by President Lula on December 18 specifically asserts Brazilian sovereignty over the Amazon and tasks the military with preserving it. End note.) The case also pitted state interests against the federal government: Roraima politicians across the political spectrum supported the rice growers, while the federal executive branch continued to back its 2005 decree for continuous demarcation that had provoked the court challenge in the first place. The case also produced an historic first when CIR's attorney, Joenia Batista de Carvalho, a Wapichana Indian woman, became the first indigenous person to argue a case before Brazil's highest court.

Background

¶4. (U) The RSS occupies an area of 1.7 million hectares (17,000 km²), or slightly less than Connecticut and Rhode Island together, in the state of Roraima bordering Venezuela and Guyana. The population of the RSS is about 19,000, including Macuxis, Wapichanas, and three other Indian ethnicities; Indians have been living there since before the arrival of Europeans. Seven non-indigenous rice growers, all of them natives of other states, have been active in the RSS since the 1990s.

¶5. (U) In 2005, the GOB designated the RSS an Indian reservation, subject to final demarcation of boundaries. The GOB informed non-indigenous persons they had to leave and

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rice growers that they could not continue production inside the reservation. The GOB offered indemnity, and many accepted it and moved out. A small number of non-indigenous persons remain; they are mostly persons married to Indians. The rice growers do not live inside the reservation, but employ many Indians who do. In 2005 a number of interests brought suit against the GOB in the STF to block the demarcation, and it was that case that the Court considered on December 10.

Legal References

¶6. (U) In defense of the continuous demarcation case, CIR and other indigenous groups cited the Brazilian Constitution and international law. Article 231 of the Brazilian Constitution of 1988 provides extensive guarantees of indigenous rights, including "their original rights to lands they traditionally occupy," although certain water and mineral rights require congressional authorization, while references in international law include Article 26 of the UN Declaration on the Rights of Indigenous Peoples, which Brazil voted for, and ILO Convention 169, which Brazil ratified, which discusses land in Part II (Articles 13-19).

Judges Cite Constitution, Not UN Declaration

¶7. (U) The STF judges who spoke on December 10 cited the Brazilian Constitution, not international law, in their statements. Two judges referred to the UN Declaration, but only to emphasize that the Constitution is paramount. Minister Carlos Alberto Menezes Direito said the Declaration cannot take precedence over national sovereignty and the federative principle. Minister Cezar Peluso said the Court, in this case, should declare the "complete juridical inoperability" of the Declaration, which in his view was nothing more than a political "exhortation" in behalf of indigenous peoples, and since it is neither treaty nor international convention, has no normative status. As far as Mission knows, no judge even referred to ILO Convention 169 in her/his opinion. (Comment: Unlike the UN Declaration, ILO Convention 169, as an international convention that Brazil ratified, could have been cited by the judges as binding law, although its language may have been too vague to help this case. Moreover, the Brazilian Constitution already had

enough broad language for the continuous demarcation advocates. End comment.) Opponents of continuous demarcation argued that the administrative procedures leading up to the demarcation in 2005 were so seriously flawed and partial that the decision should be reconsidered.

National Sovereignty Not Threatened

¶8. (U) In a response to arguments that continuous demarcation would harm national sovereignty by limiting federal access to strategic Indian lands, Minister Menezes Direito stated that access to the region by federal troops and police must not be hindered, and Indians must not have the right to block federal infrastructure projects such as highways. He set out eighteen limitations to Indian rights that will have the force of law when the Court's ruling is official after the remaining three votes are cast. (Note: The limitations reiterate existing Constitutional limitations on land, water, and mineral rights, but they also explicitly set out federal and state government rights and free transit rights for non-indigenous persons on which the Constitution is silent. End note.) Defense Minister Nelson Jobim said he does not consider that the ruling increases the region's vulnerability, and said the guarantee of unrestricted military access to the RSS will not increase tension because Indians accept the presence of military forces there. Jobim and indigenous activists are on the same page on this point: Executive Secretary Kleber Karipuna of the Coordination of Indigenous Organizations of the Brazilian Amazon (COIAB) told poloff that throughout the Amazon region Indians make up the a large number of conscripts and indigenous people have no

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quarrel with the presence of Brazilian soldiers.

Precedent for Indian Land Cases

¶9. (U) The decision is expected to serve as precedent for as many as 227 other cases of Indian lands still in administrative processing, and Minister Peluso said the Court's decision on the matter ought to become a national precedent, a "leading case."

¶10. Comment: (U) The RSS case was a landmark test of the indigenous land rights set out in the 1988 Constitution. If the Constitution did not contain broad guarantees of Indian land rights, the case could have turned out differently, possibly even decided with reference to the UN Declaration or the ILO Convention. But without the Constitution's guarantees of Indian rights, the 2005 decree on the RSS might have been impossible in the first place. This a victory not only for those in favor of strong protections for indigenous land rights, it is a victory for federal power over local Roraima interests. Finally, we should note that the UN Declaration, which the USG voted against, did not serve as a basis for the judicial decision and therefore was not strengthened either nationally or globally, while judges strengthened the Constitution as the source of law by basing their decisions wholly on existing Constitutional rights.

KUBISKE